



[Docket No. HM-74; Amdt. Nos. 173-97;
178-39]

PART 173—SHIPPERS

PART 178—SHIPPING CONTAINER SPECIFICATIONS

Inspection and Testing Requirements for Cylinders Manufactured Outside the United States

This docket was opened on January 19, 1971, when the Hazardous Materials Regulations Board announced that it was considering the necessity for continuing the domestic analysis and test rule (36 FR 838) and that a public hearing had been scheduled for that purpose. The domestic analysis and test rule, found in the compressed gas cylinder specifications of Part 178, requires that an analysis of metal to be used in making a cylinder, as well as tests on the finished or partially finished product, be conducted within the United States, regardless of where that cylinder is manufactured. On June 10, 1971, following a two-day public hearing, the Board announced, based on information then available, that it had concluded that analyses and tests could be performed outside the United States under appropriately controlled manufacturing procedures.

The Board at the same time also used amendments it believed would abolish that control (36 FR 11224).

The 1971 proposals would have—

Required all disinterested inspectors to be approved by DOT rather than by the Bureau of Explosives of the American Association of Railroads, as is the current practice;

2. Required disinterested inspection of all foreign-made cylinders, while continuing to allow interested inspection of domestic-made low pressure cylinders (inspection by an employee of the cylinder manufacturer); and

3. Allowed, for the first time, analyses and tests to be made outside the United States, but only upon DOT manufacturing approval, and only in conjunction with DOT-approved disinterested inspection.

The docket remained open for public comment until November 1971. It was reopened February 3, 1972, to consider what additional changes to the cylinder specifications of Part 178, if any, might be

necessary to the transportation safety of compressed gas cylinders. The February 1972 notice also sought comment on what specific qualifications and requirements cylinder inspectors should be required to meet before being approved by DOT. The docket remained open for comment until October 3, 1972.

On January 13, 1976 (41 FR 1919), a thorough consideration of the contents of the docket, a revised notice of proposed rulemaking was published, which essentially repeated the 1971 proposals. In addition, the revised notice also proposed—

DEPARTMENT OF TRANSPORTATION

MATERIALS TRANSPORTATION BUREAU

WASHINGTON, D.C. 20590

18412

1. A substitution of the term "independent inspection agency" for "disinterested inspector";

2. A specific process by which a person could apply for approval as an independent inspection agency, a similar process by which a manufacturer could apply for approval to conduct analyses and tests outside the United States, and the information necessary to support such applications (including designation of an agent for service of process for nonresident applicants);

3. The discontinuance of authority for domestic manufacturers of low pressure cylinders to use interested inspectors in favor of independent inspectors (a proposal which has since been severed from this docket and is presently being considered under Docket HM-74A, 41 FR 11179, March 17, 1976).

Well over 300 comments have been received on this rulemaking since it was first opened, about 30 of which have been received since publication of the revised notice early this year. Interest has been expressed by domestic cylinder users, domestic steel suppliers, and both foreign and domestic cylinder manufacturers, trade associations and inspection agencies. References herein are to comments received on the January 1976 revised notice. Those comments, however, are generally representative of comments on earlier docket publications.

THE DOMESTIC ANALYSIS AND TEST RULE

The domestic analysis and test rule dates to 1923 and was originally intended to protect American citizens against gas cylinders of uncertain pedigree. At a time preceding rapid transoceanic travel and communication, the necessity for the rule was clear.

The nature of that necessity has gradually altered. A substantial exchange of complex industrial and scientific information now occurs among Europe, the United States and elsewhere, and it is presently possible for the Department to perform an inspection at a foreign location almost as quickly as at a domestic location. The MTB believes it is practical to establish a properly supervised alternate method involving analysis and testing outside the United States, by which a foreign cylinder manufacturer can comply with the Department's gas cylinder regulations.

It was apparent early in this docket that some domestic users of compressed gas cylinders, as well as some foreign manufacturers, consider themselves unnecessarily burdened by the domestic analysis and test rule. To enter the American cylinder market, a foreign manufacturer must not only adjust his usual testing and manufacturing cycle to meet DOT requirements, he must also face additional costs and manufacturing delays resulting from the domestic analysis and test rule.

Some domestic cylinder users believe

that price and supply in the domestic cylinder market reflect a lack of competition and attribute that condition to the rule, perceiving in it a non-tariff trade barrier that effectively prevents the entry of quality foreign-made cylinders. A representative of the Department of Justice Antitrust Division, in the March 16, 1971 public hearing which is part of this docket, observed similarities between trade restraints intended to be remedied by an antitrust suit filed against the American Society of Mechanical Engineers and the claimed trade barrier effects of the domestic analysis and test rule. In a separate action as late as last year, the Justice Department obtained a consent decree effectively reversing the acquisition of Pressed Steel Tank Company by Norris Industries, the second and fourth largest producers of high pressure cylinders in the United States.

In light of a docket which extends back to 1971, the MTB has concluded that domestic analysis and testing are not any more conducive to safety than properly supervised analysis and testing occurring elsewhere. Moreover, the MTB recognizes the obvious difficulties that the domestic analysis and test rule imposes on foreign cylinder manufacturers and the possibility that those difficulties may be reflected in the domestic cylinder market. Continuance of the Department's reliance on the domestic analysis and test rule as the exclusive means by which foreign-made cylinders can be manufactured in compliance with safety regulations may be tantamount to regulating transportation safety by effectively prohibiting importation of most foreign-made cylinders without regard to quality. The domestic analysis and test rule was never intended to prohibit the importation of foreign-made compressed gas cylinders but to insure that those imported are safe. The amendments are intended to provide a more reliable and economically less burdensome means of distinguishing between good and bad cylinders.

In defense of retaining the domestic analysis and test rule, the American Cylinder Manufacturers Committee (ACMC), commenting on other materials found in the docket, states that—

[t]estimony . . . which seeks to establish that the current safety regulations are a non-tariff trade barrier or provide the domestic cylinder manufacturers with a monopoly in the domestic cylinder market or limit the supply of cylinders available in this country is irrelevant to this proceeding and invalid [T]he only information which OHMO may consider in its evaluation of the issues raised by HM-74 is information relevant to the safety of compressed gas cylinders introduced into interstate commerce.

The ACMC is generally correct. The statutory responsibility of the Department is transportation safety. On that basis, the new amendments are an improvement over the existing regulations.

The amendments are expected to increase the control and supervision exercised by DOT over foreign manufacturers, as well as over many domestic manufacturers. The amendments accomplish this by requiring all independent inspectors to be approved by DOT, by requiring that all foreign-made cylinders and domestic-made high pressure cylinders be subjected to independent inspection, and by requiring DOT manufacturing approval in any case where analyses and tests are to be performed outside the United States.

An additional consideration is the fact that retention of the domestic analysis and test rule, absent some justification in transportation safety, wrongly places the Department in the position of preemptively regulating an aspect of national economic policy and foreign trade which is properly addressed by Congress and other Federal agencies. In short, although the new amendments promise greater transportation safety, even if they did not, there would still remain a legitimate question of whether the existing regulations achieve safety in an efficient manner.

CONDITIONS OF FOREIGN CYLINDER MANUFACTURE

Many of the comments addressed to foreign manufacturers as a group, asserting that foreign manufacturers have in the past fallen short of meeting DOT specifications, do not now manufacture to DOT specifications, lack adequate testing and inspection procedures and have poor quality control. The conclusion apparently urged is that until all reliable foreign manufacturers have been evaluated as part of that group, is not any single manufacturer can be said to be competent to manufacture gas cylinders to DOT specifications.

An attempt to exhaustively evaluate all foreign manufacturers before approving any one of them would be wasteful and would produce results of questionable value. Comments from both foreign and domestic interests recognize that foreign cylinder manufacturers constitute a diverse group which unquestionably includes a great many concerns that will never seek entry into the U.S. cylinder market, as well as concerns that will not or cannot comply with DOT regulatory standards. The amendments are therefore structured to provide an individual evaluation of each foreign inspection agency and foreign manufacturer who seeks DOT approval.

Several other comments expressed the view that foreign cylinder manufacturers will have an unfair price advantage because of the availability of cheap labor, or because ineffective regulatory supervision will allow production of defective and thus less expensive cylinders than the quality product of a domestic manufacturer. Cheap labor, to the extent it does exist in countries sufficiently advanced technologically to manufacture cylinders, may indeed result in low manufacturing costs. Foreign producers, however, are also subject to a 5% or tariff, additional transportation and DOT inspection costs that are not faced by their domestic counter-

parts. There exist outside the DOT appropriate means of dealing with unfair import competition.

With regard to the possibility of lax regulatory enforcement, it is the intent of the Department that regulatory compliance by foreign manufacturers will be as complete as compliance by domestic manufacturers.

REGULATION OF FOREIGN MANUFACTURERS AND INSPECTORS

A number of comments expressed the view that regulating foreign cylinder manufacturers and inspectors is difficult, expensive and beyond the capacity of DOT. One comment suggested that unannounced inspection of foreign manufacturers would be "impractical, if not impossible". DOT inspection of foreign facilities may in some cases be more difficult than inspection of domestic facilities, but it is practical and will be used in essentially the same fashion as it is used domestically. The amendments require the cost of foreign inspection by the Office of Hazardous Materials Operations to be borne by the manufacturer or inspection agency seeking DOT approval as a condition of that approval. The intention is to recover "out-of-pocket" costs to the United States Government for foreign inspections considered necessary to evaluate an approval application, or necessary to monitor an approval holder, but not to recover salary for OHMO personnel.

Another series of comments suggested that the regulations governing cylinder manufacture are so vague that only the domestic industry, with its record of safety, common regulatory experience and common language can be relied upon for comprehension and compliance. It is clear that some foreign manufacturers are capable of making cylinders to DOT specifications and that the regulatory provisions governing cylinder manufacture are capable of communication outside the United States. Differences between domestic and foreign manufacturers can be evaluated in the course of considering approval applications and monitoring approval holders.

Finally, a number of commenters addressed problems foreseen in making civil or criminal penalties effective against a foreign cylinder manufacturer or inspection agency, or collecting from him a tort judgment. A nonresident manufacturer who chooses to conduct analyses and tests outside the United States, or a nonresident inspection agency, must designate a domestic agent for service of process before DOT approval will be granted. Service on that agent will be sufficient for purposes of civil or criminal action under the Hazardous Materials Transportation Act of 1974 (Pub. L. 93-633, 49 U.S.C. 1801 et seq.) when the necessary implementation of the Act's relevant provisions is completed (see Docket HM-134, 41 FR 9188, March 3, 1976). Actual enforcement of any such action is in any event backed by withdrawal of Departmental approvals. In the case of a civil suit, the MTB recognizes that reaching assets located outside the United States may be more difficult than reaching domestic assets. The concern of the MTB in this matter is

that some products liability exposure exist to provide additional motivation for cylinder producer to avoid manufacturing errors. Distinctions between jurisdictions as to proof of liability and manner of recovery are marginal to this concern.

THE APPROVAL PROCESS

A criticism made by several commenters dealt with what is perceived as the lack of specificity in the criteria to be used in determining whether to grant approval to a foreign manufacturer or inspector. One commenter addressing the approval process in particularly useful detail was Union Carbide Corporation. Certain of the Union Carbide comments regarding clarity of the proposed rules have been incorporated into the final rules, and others are addressed here.

The term "person" used in the amendments is defined at 49 CFR 171.8 (41 FR 15995, April 15, 1976) as an individual, firm, co-partnership, corporation, company, association, joint stock association, or trustee, receiver, assignee or personal representative of the foregoing.

Among the items of information necessary to support an inspection agency application, new § 173.300a(b) (6) requires identification and qualifications of those inspectors responsible for certifying inspection and test results (certifying inspectors). Certifying inspectors are responsible for the proper performance of inspection duties. Certifying inspectors may witness or perform themselves, or supervise others in activity. In the latter case, new § 173.300a(b) (7) requires a method by which such supervised inspectors may be individually identified. Supervised inspectors may not certify inspection or test results. They are answerable as part of the independent inspection agency, cannot be an employee of the cylinder manufacturer, and cannot delegate their functions. The certifying inspector cannot delegate his certification functions. Actual organizational arrangements must be specified in the application and must meet the circumstances of manufacture.

From applicant inspection agencies, the amendments also require identification and description of testing facilities, a description of the agency's ability to perform duties imposed by Part 178, a description of ownership interests in the agency, and for nonresident agencies, a designation of agent for service of process.

From applicant manufacturers, the amendments require identification and description of each facility at which cylinders are to be manufactured or where analyses and tests will occur. Complete details on each specification cylinder for which manufacturing approval is sought must be provided, and the independent inspection agency to be used must be identified. Nonresident manufacturers must designate an agent for service of process.

The MTB believes that the level of specificity in the new amendments is sufficient to give notice as to how the approval process is expected to operate. A great number of factors, such as experience, credentials, training, available equipment and other resources, as well

for inspection are involved in the approval process. To at least some extent, the manner of recovery are marginal to this concern. action would not exist and concerns that the inspectors dealt with what is perceived as the lack of specificity in the criteria to be used in determining whether to grant approval to a foreign manufacturer or inspector. One commenter addressing the approval process in particularly useful detail was Union Carbide Corporation. The effect of the Union Carbide comments regarding clarity of the proposed rules or a foreign have been incorporated into the final rules, and others are addressed here. considered. OHMO, and An approval terminated with Subchapter Federal civil, or if co not constitute transportation category could a final judgment related to inspection distances and existence of ure to produce of independent on age or to a al holder for that act to show wh terminated. Provision domestic Bureau of competent prior to M plication a tials, to be dependent: cles will be an approv United Sta choose to: DOT appro presentative credentials plosives ci July 15, Bureau of ceptable as date, such nized for a In cons CFR, Far follows: 1. New 300c are a § 173.300 spect (2) A1 ifact port (2) 1 trolled t manufac transpor may app portation

agencies) independent each approval decision to enumerate each a constant relationship and final approval at times that do the important amendments that substantial discretionary. Additional insight for any approval in the course of approval holders activity.

approval issued to independent inspection agency manufacturer is limited by terms or conditions by the Director, ed therein. ed either a manufacturing agency may be aud, noncompliance 2, nonsatisfaction of final enforcement action of the approval is the requirements of sty. The latter category nonsatisfaction of involving a tort claim manufacturing or in- les; other circum- the practical non-approval holders' exposure tort liability; or, a ce by an approved in-

termination, the ap- be notified of the basis given an opportunity p- l should not be

L made for any on agency, which the yes has designated as a disinterested inspector 1978, upon timely representation of creden- ved as a domestic in- tion agency. Such agen- d by the terms of such activities within the which reason they may a full application for sequent to or instead of Bureau of Explosives mission of Bureau of Ex- als must be made by until August 15, 1978, sives designation is ac- approval. Following that action will not be recog- pose.

on of the foregoing, 49 and 178 are amended as

300a, 173.300b, and 173.- read as follows:

approval of independent in- eney.

son who (1) does not yinders for use in the of hazardous materials directly or indirectly con- person or firm which y- rs for use in the arduous materials, a rtment of Trans- approval as an independ-

ent inspection agency for the purpose of performing cylinder inspections and verifications required by Part 178 of this subchapter.

(b) Each application filed under this section for approval as an independent inspection agency must:

(1) Be submitted in writing to: Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590;

(2) State the name, address, principal business activity, and telephone number of the applicant and the name and address of each facility where tests and inspections are to be performed;

(3) State the name, address and principal business activity of each person having any direct or indirect ownership interest in the applicant greater than three percent and of each subsidiary or division of the applicant;

(4) If the applicant is not a permanent resident of the United States, include a designation of a permanent resident of the United States as his agent for service of process in accordance with § 107.7 of this title;

(5) Set forth a detailed description of the inspection and testing facilities to be used by the applicant and the applicant's capability to perform the inspections and verify the tests required by Part 178 of this subchapter;

(6) Identify by name each individual whom the applicant proposes to employ as an inspector responsible for certifying inspection and test results and a statement of that person's qualifications; and

(7) Specify the identification or qualification number assigned to each inspector who is supervised by a certifying inspector identified in § 173.300a(b) (6).

(c) Upon the request of the Director, OHMO, the applicant shall allow the Director to inspect the applicant's inspection and testing facilities. In the case of inspection and testing facilities located outside the United States, the applicant shall bear the cost of the inspection.

(d) If, on the basis of information submitted in the application and his own investigation, the Director, OHMO, finds that the applicant is qualified to perform the inspections and verifications required by Part 178 of this subchapter for cylinders to be used in the transportation of hazardous materials, he issues an approval subject to such terms and conditions as he considers necessary.

(e) The Director, OHMO, will issue an approval as an independent inspection agency for the purpose of performing inspections and verifications within the United States to any competent and disinterested inspector of cylinders so designated by the Bureau of Explosives before May 1, 1976, who submits a copy of that designation by July 15, 1976, together with the name, the assigned identification or qualification number, and a statement of the qualifications of each person employed as an inspector under that designation to: Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590.

(f) Notwithstanding any requirement of this subchapter to the contrary, between May 30, 1978, and August 15, 1978,

inspections and verifications required by Part 178 may be performed within the United States by any competent and disinterested inspector so designated by the Bureau of Explosives prior to May 1, 1976.

(g) An approval issued under this section is not transferable and is effective until surrendered or withdrawn or otherwise terminated by the Director, OHMO.

(h) The holder of an approval issued under this section shall notify the Director, OHMO, within 20 days after the date there is any change in the information submitted in the application for the approval.

(i) Upon the request of the Director, OHMO, the holder of an approval issued under this section shall allow the Director to inspect the holder's inspection and testing facilities and shall make available for inspection the holder's records pertaining to inspections and verifications required by Part 178 of this subchapter. In the case of inspection and testing facilities located outside the United States and records made available for inspection outside the United States, the holder shall bear the costs of inspection.

§ 173.300b Approval of non-domestic chemical analyses and tests.

(a) Any person who manufactures cylinders outside the United States may apply to the Department for approval to have the chemical analyses and tests of those cylinders required by Part 178 performed outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials to, from or within the United States.

(b) Each application filed under this section for approval to perform chemical analyses and tests of cylinders outside the United States must:

(1) Be submitted in writing to: Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590;

(2) State the name, address, and telephone number of the applicant and the name, address and a description of each facility at which cylinders are to be manufactured and chemical analyses and tests are to be performed;

(3) If the applicant is not a resident of the United States, include a designation of a permanent resident of the United States as his agent for service of process in accordance with § 107.7 of this title;

(4) Set forth complete details concerning the dimension; materials of construction, wall thickness, water capacity, shape, type of joints, location and size of openings and other pertinent physical characteristics of each specification cylinder for which approval is being requested, including calculations for cylinder wall stress and wall thickness which may be shown on a drawing or on separate sheets attached to a descriptive drawing. If units of weights and measures are expressed in the metric system, they must also be stated in the English system equivalents; and

(5) Identify the independent inspection agency to be used.

(c) Upon the request of the Director, OHMO, the applicant shall allow the Director to inspect the applicant's cylinder manufacturing and testing facilities and shall provide such materials and

cylinders for analyses and tests as the Director may specify. The applicant shall bear the cost of the inspections, analyses, and tests.

(d) On the basis of the information submitted in the application and his own investigation, the Director, OHMO, finds that the applicant has the proper manufacturing equipment and facilities and is otherwise capable of insuring the proper performance of the chemical analyses and tests required by Part 178 of this subchapter for cylinders to be used in the transportation of hazardous materials, the issues and approval, subject to such terms and conditions as he considers necessary.

(e) An approval issued under this section is not transferable and is effective until surrendered or withdrawn or otherwise terminated by the Director, OHMO.

(f) The holder of an approval issued under this section shall notify the Director, OHMO, within 20 days after the date there is any change in the information submitted in the application for the approval.

(g) Upon the request of the Director, OHMO, the holder of an approval issued under this section shall allow the Director to inspect the holder's cylinder manufacturing and testing facilities, any cylinder manufactured under that approval, the holder's inspection and test records, and technical data files pertaining to any cylinder manufactured under that approval. In the case of facilities located outside the United States, or cylinder records or files made available for inspection outside the United States, the holder shall bear the costs of inspection.

§ 173.300c Termination of approval.

(a) The Director, OHMO, may terminate an approval issued under § 173.300a or § 173.300b of this subpart if he determines—

(1) That information upon which approval was based is fraudulent or substantially erroneous;

(2) That the holder has not complied with Subchapter C of this chapter;

(3) That, in the case of an independent inspection agency, the agency or an employee thereof is or appears to be controlled or improperly influenced by cylinder manufacturing interests;

(4) That the holder is subject to an outstanding final judgment of a Federal court which concerns the enforcement of Subchapter C and which has not been satisfied within a reasonable period of

time; or

(5) That continuation of the approval is not consistent with the requirements of transportation safety.

(b) The Director, OHMO, before he terminates an approval issued under § 173.300a or § 173.300b of this subpart, notifies the holder in writing of the reasons therefor and provides the holder an opportunity to show why the approval should not be terminated.

2. In section 173.301, paragraph (1) and the introductory text of paragraph (j) are revised to read as follows:

§ 173.301 General requirements for shipment of compressed gases in cylinders.

(i) *Foreign cylinders in domestic use.* A charged cylinder manufactured outside the United States may not be offered for transportation to, from, or within the United States unless it has been manufactured, inspected, and tested in accordance with the applicable DOT specification set forth in Part 178 of this subchapter.

(j) *Charging of foreign cylinders for export.* Unless it has been manufactured, inspected, and tested in accordance with the applicable DOT specification set forth in Part 178 of this subchapter, a cylinder manufactured outside the United States and received in the United States for charging with compressed gas may be charged and shipped for export only.

3. Sections 178.36-3, 178.37-3, 178.41-3, 178.43-3, 178.44-3, 178.45-3, 178.47-3, 178.48-3, 178.49-3, 178.54-3, and 178.58-3 are revised to read as follows:

§ 178.--- Inspection by whom and where.

Inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OHMO, in accordance with § 173.300a of this subchapter. Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OHMO, in accordance with § 173.300b of this subchapter.

4. Sections 178.38-3, 178.39-3, 178.40-3, 178.42-3, 178.50-3, 178.51-3, 178.52-3, 178.53-3, 178.55-3, 178.56-3, 178.57-3, 178.61-3, and 178.68-3 are revised to read as follows:

§ 178.--- Inspection by whom and where.

Inspections and verifications must be

performed by an independent inspection agency approved in writing by the Director, OHMO, in accordance with § 173.300a or, in the case of cylinders manu-

factured in the United States, a competent inspector of the manufacturer. Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OHMO, in accordance with § 173.300b of this subchapter.

5. In §§ 178.59-3 and 178.60-3, paragraph (a) is revised to read as follows: § 178.---3 [Amended]

(a) Inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OHMO, in accordance with § 173.300a or, in the case of cylinders manufactured in the United States, a competent inspector of the manufacturer. Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OHMO, in accordance with § 173.300b of this subchapter.

6. Section 178.65-3 is revised to read as follows:

§ 178.65-3 Inspection by whom and where.

(a) In the case of cylinders having marked service pressures higher than 900 psig, inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OHMO, in accordance with § 173.300a of this subchapter.

(b) In the case of cylinders having marked service pressures of 900 psig or lower, inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OHMO, in accordance with § 173.300a of this subchapter or, in the case of cylinders manufactured in the United States, by a competent inspector of the manufacturer.

(c) Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OHMO, in accordance with § 173.300b of this subchapter.

(18 U.S.C. 834, 46 U.S.C. 170(7), 49 U.S.C. 1472(h)(1), 49 CFR 1.53(f)-(h).)

Effective date: These amendments take effect May 30, 1976.

Issued in Washington, D.C., on April 28, 1976.

JAMES T. CURTIS, Jr.,
Director,

Materials Transportation Bureau.

[FR Doc. 76-12870 Filed 5-3-76; 8:45 am]